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BEFORE THE
POSTAL REGULATORY COMMISSION
WASHINGTON, D.C. 20268-0001

Modern Rules of Procedure for the Issuance of Advisory Opinions in Nature of Service Proceedings	)))	Docket No. RM2012-4

VALPAK DIRECT MARKETING SYSTEMS, INC. AND VALPAK DEALERS' ASSOCIATION, INC. REPLY COMMENTS ON ADVANCE NOTICE OF PROPOSED RULEMAKING
(July 17, 2012)

I. The Public Representative Properly Questions Reliance on Citizens Awareness Network v. Nuclear Regulatory Commission.

The Public Representative ("PR") distinguished a 39 U.S.C. section 3661(c) Advisory Opinion proceeding before the Commission from a Nuclear Regulatory Commission ("NRC") proceeding that was the background for the First Circuit's Citizens Awareness Network decision. The Commission's Order relied on this case for the proposition that it had wide latitude to reduce due process rights for participants. *See* Order No. 1309, pp. 6-7. (Valpak addressed the inapplicability of this decision to the Commission in its Initial Comments, pages 12-17.) First, the PR correctly observes:

> In short, the Commission's adherence to trial-type proceedings in N-cases is not because it is "set in its old PRA ways," but because the PAEA retained the link to formal adjudication under the APA. [PR Initial Comments, p. 9.]

Then, the PR raises a question about the NRC statute:

> Further consideration needs to be given to whether the NRC's limited hearing process is based on language that simply refers to a "hearing on the record" or to the more extensive language in section 3661(c). [*Id.*]

Clearly, the NRC proceeding is very different than an N-docket. Citizens Awareness Network decided that the NRC statute did "not explicitly require that the hearing be on the record." To be sure, there was an issue about the NRC's statutory obligation to provide a hearing on the record, as the relevant statute only required a "hearing," but the court there "decline[d] to resolve this issue." Citizens Awareness Network v. NRC, 391 F.3d 338, 348 (1st Cir. 2004). However, the type of NRC hearing at issue in that case is not comparable to the matters the Commission faces under section 3661. The NRC procedure at issue was based on 42 U.S.C. section 2239, which provides for a licensing proceeding for a specific facility, not a nationwide change. The NRC statute did not automatically provide for a hearing, but only "upon the request of any person whose interest may be affected by the proceeding." 42 U.S.C. § 2239(a)(1)(A). The issues in such a proceeding would of necessity be limited both by geographic scope as well as the subject matter that could arise in a single facility licensing proceeding.

By contrast, 39 U.S.C. section 3661(b) is limited to "a change in the nature of postal service which will generally affect service on a **nationwide, or substantially nationwide basis**." It does not get much bigger than that. As an example of the types of proceedings covered by section 3661, the Postal Service explained in its recent initial brief in Docket No. N2012-1:

> The Postal Service has determined that Mail Processing Network Rationalization changes ("MPNR") potentially affect **every sender and recipient of mail in the United States**.... If the Postal Service is to remain a relevant and viable part of the American economy, it must implement service and operational changes that establish a stable operating platform. The MPNR is the **single most critical and dynamic act** that the Postal Service

> can undertake to accomplish these goals…. When concluded, the changes will be the **most significant changes** in the nature of service since the administrative review process in section 3661 was established as part of the 1970 Postal Reorganization Act. The changes are likely to affect **every sender and recipient of mail in the United States** and should be deemed "nationwide" within the meaning of section 3661(b). [Docket No. N2012-1, Postal Service Initial Brief, pp. 1-3, 8 (emphasis added).]

The Postal Service's brief in that N-docket eloquently demonstrates the broad scope of the issues before the Commission in an N-docket, which are much greater than a limited licensing proceeding before the NRC.

Lastly, the Postal Service and Senator Carper would attempt to downplay the Commission's role by emphasizing the Commission's advisory opinion as "non-binding advice." *See id.*, pp. 9-10. The Commission should disregard such rhetoric and carry out its statutory role to monitor and protect the provision of postal services to the people of the United States:

> The United States Postal Service shall be operated as a basic and fundamental service provided to the people by the Government of the United States, authorized by the Constitution, created by Act of Congress, and supported by the people. The Postal Service shall have as its basic function the obligation to provide postal services to bind the Nation together through the personal, educational, literary, and business correspondence of the people. [39 U.S.C. § 101(a).]

The Commission's rules for Advisory Opinions on changes in the nature of postal services should properly reflect the importance of the Postal Service and provide an appropriate level of due process for participation, and not look to the bare minimum required by the APA as the primary guidance.

II. APWU Recommendations Could Speed Discovery Period.

Initial Comments filed by the American Postal Workers Union, AFL-CIO ("APWU") made several constructive recommendations for changing the discovery process in N-dockets. Among these recommendations was shortening the time to file an objection to an interrogatory from 10 days to 5 days, as well as shortening the time for filing a motion to compel an answer to an interrogatory from 14 days to 10 days. *See* APWU Initial Comments, p. 6.

Valpak agrees with these recommendations and believes that, if adopted, it would accelerate motions practice and help move the docket along by obtaining information that the Commission can rely on for its Advisory Opinion. Additionally, the Commission rules provide seven days for an answer to a motion to compel (*see* 39 C.F.R. § 3001.26(d)), and for the same reasons advanced by APWU, this period could and probably also should be reduced to perhaps four days.

III. The Postal Service Demeans the Importance of Intervenor Participation and Minimizes the Importance of Commission Advisory Opinions.

The Postal Service believes that the Commission's rulemaking in this docket will be unable to expedite N-dockets to its liking. The Postal Service "does not believe that regulatory changes alone are the best and most efficient solution to resolving" N-dockets. Postal Service Initial Comments, p. 2. Rather, the Postal Service believes that for real reform, Congress must change the law that now provides due process rights to intervenors by imposing a "90-day time limit on N-cases and … lifting … the applicability of formal hearing requirements under 5 U.S.C. §§ 556 and 557…." *Id.* Indeed, the Postal Service has disdain for Congress' statutory plan, as it discusses an N-docket as merely "a non-binding opinion" to be

distinguished from a decision "with more direct effect…." *Id.*, p. 5. Yet, without a statutory change, the Postal Service still urges the Commission to change its rules to achieve the only objective that it considers significant — "the need for a more 'expeditious' hearing process…." *Id.*, p. 2.[1]

A. The Postal Service Misunderstands the Requirements of APA

In asserting its need for speed, the Postal Service wholly ignores the requirements of current law, that N-dockets must be conducted as a "hearing on the record under [5 U.S.C.] sections 556 and 557." 39 U.S.C. § 3661(c).

The Postal Service does not base its demand for a maximum "90-day period" as being the shortest period within which the Commission may abide by current law and provide the requisite due process for mailers — it evidences no concern for or appreciation of their role. The Postal Service is exclusively focused upon "the financial position of the Postal Service…." Postal Service Initial Comments, p. 3.

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[1] The Postal Service continues to be oblivious to the role that its pricing decisions play in creating financial problems for the Postal service, and the need it perceives for expedition in Commission consideration of proposals to change the nationwide nature of service. Valpak has discussed the problem which the Postal Service inflicts on itself with underwater products on many occasions. *See*, *e.g.*, Docket No. ACR2011, Valpak Initial Comments (Feb. 3, 2012), pp. 24-35; Docket No. R2012-3, Valpak Comments (Nov. 7, 2011), pp. 2-7. Even after the Postal Service's pricing of deeply underwater Standard Flats has been determined to be illegal by the Commission, and confirmed by the courts, the Postal Service has refused to remedy the problem. *See* Docket No. R2012-9, Valpak Comments (July 17, 2012), pp. 2-3. In this Docket, the Postal Service asserts that Annual Compliance Review dockets are more important than N-Dockets, as they "lead to final, binding orders" but the Postal Service certainly has not acted as if the Commission's order is binding with respect to Standard Flats. Postal Service Initial Brief, p. 8.

The Postal Service actually proposes that many N-dockets be resolved in 45 days, others in 60 days, and only a few in 90 days. Postal Service Initial Brief, p. 9. The Postal Service never addresses how such a brief period could be consistent with due process or the APA.

The Postal Service would allow an extension of the 90-day period, but only if "the Commission and the Postal Service agree otherwise in the context of a specific proceeding." Postal Service Initial Comments, p. 8. Here the Postal Service confuses the rule of regulator and regulated, asking the Commission to share the rulemaking power Congress vested in the Commission with the Postal Service. And, the Postal Service totally disregards the role of mailers and intervenors.

The Postal Service repeatedly embraces the Commission's citation to the Citizens Awareness Network case, a First Circuit decision which does not relate directly to hearings on the record under APA section 556, and which has been demonstrated to be wholly inapplicable to this docket. Postal Service Initial Comments, pp. 4, 10. *See e.g.*, Section II, *supra*; Valpak Initial Comments, pp. 14-17. As the Postal Service's analysis is extensively based on the very different NRC model (*see* Postal Service Initial Comments, pp. 10-11), it is largely irrelevant to an N-docket.

The Postal Service refers to "many federal agencies set[ting] abbreviated timeframes for their issuance of advisory opinions, ranging from 20 to 90 days." Postal Service Initial Comments, p. 7. The such first agency cited was the Federal Election Commission ("FEC") and its rules governing Advisory Opinions — 11 C.F.R. § 112.4 — which states:

> a) Within 60 calendar days after receiving an advisory opinion request that qualifies under 11 CFR 112.1, the Commission shall issue to the requesting person a written advisory opinion or shall issue a written response stating that the Commission was unable to approve an advisory opinion by the required affirmative vote of 4 members.

Under 11 C.F.R. § 112.4, a 20-day period may apply for certain pre-election FEC Advisory Opinion requests. The Postal Service does not explain that an FEC Advisory Opinion can be sought by anyone subject to the act, and bears on the application of law or regulation to a specific, limited, fact situation. All facts must be specified, and there is no fact finding. FEC Advisory Opinion Requests can relate only to:

> a specific transaction or activity that the requesting person plans to undertake or is presently undertaking and intends to undertake in the future. [11 C.F.R. § 112.1(b).]

While FEC Advisory Opinion Requests vary in complexity, an advisory opinion relating to how one campaign may dispose of a computer is not comparable to a nationwide change in service for the Postal Service. Even then they are limited:

> Requests presenting a general question of interpretation, or posing a hypothetical situation, or regarding the activities of third parties, do not qualify as advisory opinion requests. [11 C.F.R. § 112.1(b).]

Since the FEC has an even number of six members — three Republicans and three Democrats — on a politically sensitive matter, it is not infrequent that the FEC cannot decide if a matter is legal or not, and notifies the requestor that it cannot advise them as to what the law is.[2]

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[2] In such circumstances, the requestor bears the risk of proceeding, as the FEC reserves the right subsequently to reach an opinion adverse to the requestor, and bring an enforcement action at a later time.

It would seem that not even the Postal Service really believes that a nationwide change in service can be compared to a single NRC licensing case or an FEC Advisory Opinion, as the Postal Service's Initial Brief in Docket No. N2012-1 reveals. Quoted in Section II, *supra*, the Postal Service reveals that it fully understands the sweeping application and great importance of N-dockets.

B. The Postal Service Offers Some Constructive Comments.

The Postal Service does make some comments which are helpful.

First, it urges the period for formal party intervention be shortened — which is a reform that could be accommodated. Postal Service Initial Comments, pp. 5, 27-29. The Postal Service reports that "participants have been afforded approximately 26 days to file a notice of intervention" and believes this is a carry-over from a pre-Internet period. Postal Service Initial Comments, p. 27. While the Postal Service proposal of "a few days" is too aggressive, a period of 7-10 days would appear reasonable. Mailers and other intervenors do need some time to learn about each case, and to make a decision on participation. Any shorter period would require counsel to intervene protectively, to preserve their clients right to participate when a decision is made, which would appear to serve no one's interests.

Further, the Postal Service was critical of the length of time required for Docket No. N2006-1 (END docket), which was a fair point. Postal Service Initial Comments, p. 6. The same would apply to Docket No. N2010-1 (Five-Day Delivery).

Lastly, Valpak fully endorses the Postal Service's position on field hearings as a source of considerable delay — particularly in Docket No. N2010-1 (Five-Day Delivery). *See* Valpak Initial Comments, pp. 6-7. It is a tad ironic that while the Postal Service seems to urge

stripping from intervenors the right to cross-examine witnesses in N-dockets, vesting that power in "the hearing officer" (Postal Service Initial Comments, p. 10), the Postal Service changes its position, and defends due process when its own ox is gored — "field hearings have produced speeches **without opportunity for cross-examination** or other party **interrogation**…." and "the 'testimony' is such that the Commission would be legally barred from relying on it, due to **lack of cross-examination** or other **due process guarantees** for N-case participants." Postal Service Initial Brief, pp. 26-27 (emphasis added). While Valpak agrees with allowing the Postal Service discovery, cross-examination, and other due process guarantees, it would differ from the Postal Service as it would extend these protections to all intervenors. Nonetheless, Valpak agrees with the Postal Service that such field hearings serve no meaningful role and should not be used.

Respectfully submitted,

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